

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Eugene A. Helmetsie
Serial Number: 10/774,339
Filed: February 6, 2004
Group Art Unit: 3751
Examiner: Le, Huyen D
Title: Configurable Modular Shower Surround Features
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF

Dear Sir:

Appellant submits its Brief subsequent to the filing of a Notice of Appeal on October 6, 2010. All appeal fees have already been paid. If any additional fees are due, you are authorized to charge Deposit Account No. 50-1482 in the name of Carlson, Gaskey & Olds.

Real Party in Interest

The real party in interest in this application is Masco Bath Corporation. Masco Bath Corporation is ultimately owned by Masco Corporation.

Related Appeals and Interferences

There are no related appeals or interferences.

Status of Claims

Claims 18 and 21-33 stand rejected and are pending in this application.

Status of Amendments

All amendments have been entered.

Summary of Claimed Subject Matter

As shown below in Figure 1 from the application, the application is directed to a shower surround that can be assembled in a modular manner to provide multiple possible configurations in an uncomplicated assembly.

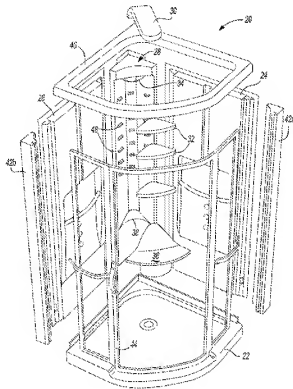


Fig - 1

The application includes a single independent claim. Independent claim 18 is directed to a shower surround including a base portion 22, a first wall portion 24, a second wall portion 26, and a corner portion 28 [Figure 1; Specification page 2, paragraph [17]]. The corner portion 28 is engaged with the base portion 22, the first wall portion 24 and the second wall portion 26 [Figure

1; Specification page 2, paragraph 17; page 3, paragraph [20]]. The corner portion 28 includes a multiple of horizontal shelf slots 48 arranged vertically along a length of said corner portion 28 [Figures 1, 5a-d, 6; Specification page 3, paragraph [20]]. The horizontal shelf slots 48 comprise blind openings of uniform height that extend into the corner portion 28 to support a corresponding multiple of shelves 32 [Figures 5a-d, 6; Specification page 3, paragraph [20]]. The base portion 28 receives the first wall portion 24, the second wall portion 26, and the corner portion 28 [Figure 1; Specification page 2, paragraph [17]].

Grounds of Rejection to be Reviewed on Appeal

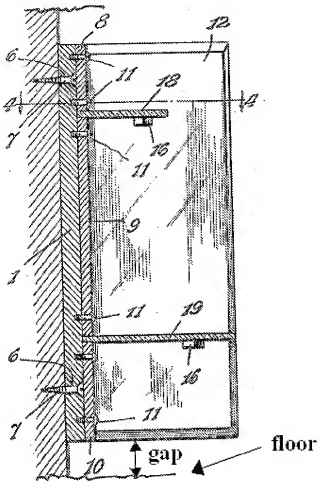
- I. Whether the rejection of claims 18, 21-27, 30 and 33 under 35 U.S.C. §102(b) over Armstrong (US 2,036,184) is proper.
- II. Whether the rejection of claim 28 under 35 U.S.C. §103(a) over Armstrong (US 2,036,184) in view of Hine (US 1,059,464) is proper.
- III. Whether the rejection of claim 29 under 35 U.S.C. §103(a) over Armstrong (US 2,036,184) in view of Kitamura (US 4,718,131) is proper.

Argument

A. §102(b) Rejection over Armstrong.

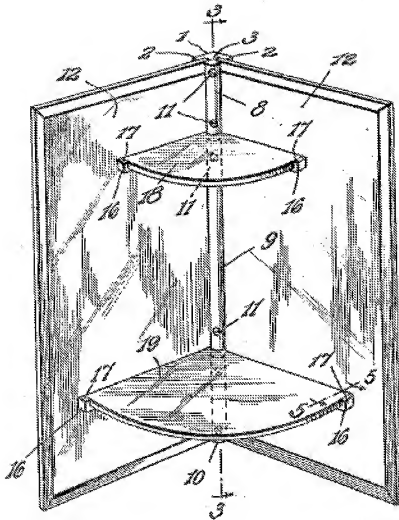
1. Independent claim 18

Independent claim 18 requires that “the base portion **receives** the first wall portion, the second wall portion, and the corner portion.” The Examiner interprets the floor of the room in which the shelving unit 19 of Armstrong resides as the claimed base. However, the floor of Armstrong does not “receive” wall portions 12 and a corner portion 8 as required by claim 18. As shown in Figure 3 of Armstrong (reproduced below), there is a gap between the bottom of the side plate 12 and the floor of Armstrong. Therefore, the floor of Armstrong does not receive the wall portions 12 and corner portion 8 as claimed. Accordingly, Applicant respectfully requests that the §102(b) rejection of claims 18, 21-27, 30 and 33 be reversed.

Armstrong: Figure 3 (with annotation)

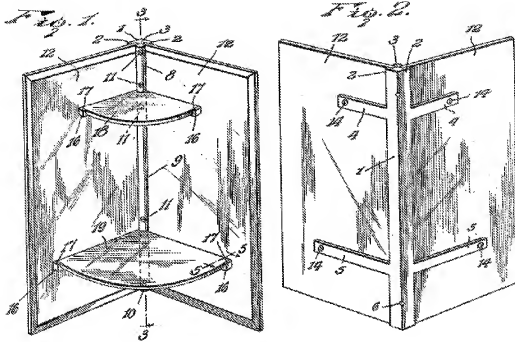
2. Dependent claim 21

Claim 21 requires “a top wall,” and Armstrong does not disclose a “top wall” of any kind. Rather, Armstrong discloses an open-ended corner shelf unit that lacks a top wall (see Figure 1 of Armstrong, reproduced below). For these reasons, the Applicant respectfully requests that the §102(b) rejection of dependent claim 21 be reversed.

Armstrong: Figure 1

3. Dependent claim 24

Claim 24 requires that the “corner portion, said top wall, said bottom wall, and said rear wall comprise a single, continuous piece.” However, Figures 1 and 2 of Armstrong (reproduced below) clearly illustrate that the corner portion 8 and the wall portion 12 are separate pieces, and are not “a single, continuous piece” as claimed. For these reasons, the Applicant respectfully requests that the §102(b) rejection of dependent claim 24 be reversed.

Armstrong: Figures 1-2

B. §103(a) Rejection Over Armstrong in View of Hine.

1. Dependent claim 28

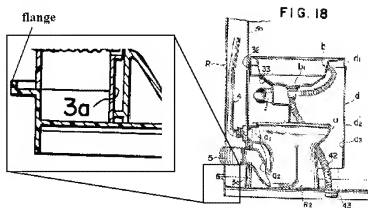
Dependent claim 28 requires that each of a “multiple of horizontal shelf slots includes multiple segments that are horizontally arranged.” The Examiner interprets the recesses 18 of Hine to be a multiple of horizontal slots, and argues that it would have been obvious to “employ slots formed between projections taught by Hine on the Armstrong shelf device for accommodating different sizes of shelves.” However, the Examiner is interpreting the spaces between members 8, 9, 10 of Armstrong as the claimed “horizontal shelf slots” (see Armstrong Figure 3, reproduced in section (A)(1) above). Because “the horizontal shelf slots” of Armstrong are merely elongated spaces between members 8, 9, 10 it would not be possible to add additional segments that are horizontally arranged as claimed. For these reasons, the Applicant respectfully requests that the §103(a) rejection of claim 28 be reversed.

C. § 103(a) Rejection Over Armstrong in View of Kitamura.

1. Dependent claim 29

Claim 29 requires “a flange extending from the base portion, the flange being located adjacent to the first wall portion and the second wall portion.” However, “to establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art” (MPEP §2143.03). As argued above, Armstrong does not disclose the claimed base portion, and the addition of Kitamura does not resolve this deficiency. Also, the Examiner interprets Kitamura as disclosing a flange extending from a base R2 (see annotated Figure 18 of Kitamura below). However the flange is not on the floor surface R2. The flange of Kitamura extends from a side of the unit room R. Therefore, Kitamura does not disclose a flange extending from a base as claimed. For these reasons, Applicant respectfully requests that the § 103(a) rejection of claim 29 be reversed.

Kitamura: Figure 18 (with annotation)



Additionally, the Examiner argues that it would have been obvious “to employ Armstrong shelf device in a room having a bottom wall with a flange extending therefrom in view of the teaching of Kitamura et al., wherein doing so would be an obvious design change.” However, obviousness under *KSR International Co. v. Teleflex Inc.* 550 U.S. 398, 127 S.Ct. 1727, 82 U.S.P.Q.2d 1385 (2007) requires a reason for combining the elements of the prior art in the manner claimed. Moreover, rejections based on obviousness cannot be sustained by mere conclusory statements. There must be an articulated reasoning with some rational underpinning

to support the conclusion of obviousness, and the reasoning should be made explicit. *Id.* at 1395. The stated reasoning is both circular and conclusory, essentially stating that a feature would be obvious because it would be obvious. Therefore, the rejection does not establish prima facie obviousness. For these reasons, Applicant respectfully requests that the §103(a) rejection of claim 29 be reversed.

CLOSING

For the reasons set forth above, the final rejection of claims 18 and 21-33 is improper and should be reversed.

Respectfully submitted,

/Timothy C. Bradley/
Timothy C. Bradley, Reg. No. 59,497
Carlson, Gaskey & Olds
400 W. Maple Road, Ste. 350
Birmingham, MI 48009
(248) 988-8360

Dated: December 6, 2010

CLAIMS APPENDIX

18. A shower surround comprising:
a base portion;
a first wall portion;
a second wall portion; and
a corner portion engaged with said base portion, said first wall portion and said second wall portion, said corner portion comprising a multiple of horizontal shelf slots arranged vertically along a length of said corner portion, wherein said horizontal shelf slots comprise blind openings of uniform height that extend into said corner portion to support a corresponding multiple of shelves, wherein the base portion receives the first wall portion, the second wall portion, and the corner portion.
21. The shower surround as recited in claim 18, wherein at least one of said horizontal shelf slots is defined by a top wall, a bottom wall facing toward said top wall, a rear wall and an open front side.
22. The shower surround as recited in claim 21, wherein said at least one of said horizontal shelf slots includes a uniform nominal depth extending into said corner portion between end portions of said horizontal shelf slots.
23. The shower surround as recited in claim 18, wherein each one of said horizontal shelf slots is adapted to support one of said corresponding multiple of shelves.
24. The shower surround as recited in claim 21, wherein said corner portion, said top wall, said bottom wall, and said rear wall comprise a single, continuous piece.
25. The shower surround as recited in claim 21, wherein said uniform height is defined as the distance between said top wall and said bottom wall.

26. The shower surround as recited in claim 22, wherein said uniform nominal depth is defined as the distance between said rear wall and said open front side.
27. The shower surround as recited in claim 18, wherein said horizontal shelf slots comprise curved openings.
28. The shower surround as recited in claim 18, wherein each of said multiple of horizontal shelf slots includes multiple segments that are horizontally arranged.
29. The shower surround as recited in claim 18, further comprising a flange extending from the base portion, the flange being located adjacent to the first wall portion and the second wall portion.
30. The shower surround as recited in claim 18, further comprising a top trim engageable with said corner portion, said first wall portion, and said second wall portion.
31. The shower surround as recited in claim 30, further comprising a shower head mounted to said top trim.
32. The shower surround as recited in claim 31, further including a water conduit connecting a water supply to the shower head, the water conduit extending behind a forward-facing portion of at least one of the first wall portion or the second wall portion such that the water conduit is not visible within the shower surround.
33. The shower surround as recited in claim 18, wherein the horizontal shelf slots form protrusions on a rear side of the corner portion.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.